UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF TENNESSEE (NASHVILLE)

IN RE:	.	Case No. 18-02662
	.	Chapter 7
LEN SALAS,	.	
	.	
Debtor.	.	
	.	
. . . . .	.	
NICOLAAS BREKELMANS, et al.,	.	Adv. No. 20-90027
	.	
Plaintiffs,	.	
	.	
v.	.	
	.	701 Broadway
MAX SALAS,	.	Nashville, TN 37203
	.	
Defendants.	.	Tuesday, August 15, 2023
. . . . .	.	9:13 a.m.

TRANSCRIPT OF PLAINTIFFS' MOTION TO ALTER OR AMEND [104]
BEFORE THE HONORABLE MARIAN F. HARRISON
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Plaintiffs:	Law Office of Philip J. McNutt PLLC BY: PHILIP JAMES MCNUTT, ESQ. 11921 Freedom Drive, Suite 584 Reston, VA 20190 (703) 904-4380
For the Defendants:	Thompson Burton PLLC By: PHILLIP G. YOUNG, ESQ. 6100 Tower Circle, Suite 200 Franklin, TN 37067 (615) 465-6008
Audio Operator:	Autumn McNeese, ECR
Transcription Company:	Access Transcripts, LLC 10110 Youngwood Lane Fishers, IN 46048 (855) 873-2223 www.accesstranscripts.com

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(Proceedings commence at 9:13 a.m.)

THE CLERK: All rise. The United States Bankruptcy Court for the Middle District of Tennessee is now in session. The Honorable Marian F. Harrison presiding.

THE COURT: Good morning, folks.

MR. MCNUTT: Good morning, Your Honor.

THE COURT: One second. I want to get situated here.

THE CLERK: Sure.

THE COURT: All right. Mr. McNutt?

MR. MCNUTT: Thank you, Your Honor. First of all, I apologize for the technical foul up. I was actually at the court site but some reason I didn't hit the right button to join in to the hearing, and so I apologize for that.

THE COURT: No problem.

MR. MCNUTT: Your Honor, this is, obviously, a motion to reconsider which is, you know, a delicate motion to present to a judge who clearly is attempting to do the right thing and I think you understand that I'm not -- certainly not quarreling with the Court's abilities or the consciousness or anything like that, but I do want to say that I think based on Your Honor's decision that there are issues that were raised and are not disputed.

And there is case law that -- there's controlling case law that with respect to the two issues decided by Your Honor, we, respectfully, assert should have required a

judgment in favor of the plaintiffs.

THE COURT: Let me make one statement and maybe I wasn't clear, but in Footnote 8 of our opinion we didn't grant summary judgment in the plaintiff's claim of actual fraud pursuant to 548(a)(1)(A). So just so there's no confusion, we didn't grant summary judgment as to actual fraud.

MR. MCNUTT: Okay. I think I understand, Your Honor. And I'm glad you made that point because that did confuse me a little bit, but, respectfully, Your Honor, I still don't think that changes the gravamen of the motion that we filed.

THE COURT: I understand.

MR. MCNUTT: As Your Honor knows, motions to reconsider are very strictly limited. And I understand that in our motion we cited several cases in the Sixth Circuit, but all of which -- I believe all of which were District Court cases. I'm not sure why they were limited to District Court cases, but they're consistent so I think they're controlling.

And, essentially, the argument we're making, Your Honor, is that with respect to the two main points in Your Honor's memorandum that in effect did not decide the motions in our favor that under the controlling law we believe there was sufficient evidence and material facts not in dispute that were asserted in our motion documents and our briefing. And those factors and law we believe under the -- under rulings of the Sixth Circuit are controlling to the point where if there were

-- the phrasing of the cases is properly considered, and I'm not suggesting that Your Honor improperly considered them, I just am asserting that I don't believe they were given the consideration that they should have been in light of the factual background and the procedural background of this case. And, Your Honor, it starts with this -- as Your Honor knows, obviously, the circumstances of this adversary proceeding arose when the trustee attempted to sell the estate's interest and that the trustees avoiding any recovery claims to the defendant, Mr. Salas.

Now, the actual party asserted was Mr. Ron Salas, the defendant's son, but in all proceedings Mr. Ron Salas was represented by Mr. Young, who, also, obviously, represented the defendant, Max Salas. And with respect to the actual auction that occurred, it was Max Salas who was clearly in charge of the bidding and telling his son, or at least consulting with his son as to what the bid could be. And that's necessarily been my -- in my declaration which was attached to our motion to alter or to mend --

THE COURT: Amend.

MR. MCNUTT: -- or amend. That auction, again, was not the result of any request by the plaintiffs; it was by the request of the defendant or the defendant's son representing the defendant, and the Court allowed the sale to go forward. And, also, Your Honor ordered the procedures by which the

estate's asset was to be sold. The result was that my clients, the plaintiffs, paid $150,000 towards the estate's -- toward the rights of the estate to pursue Mr. Max Salas under the theories that are set forth in the complaint; the trustee's avoiding powers, and the fraudulent advance actions that are available under both bankruptcy and state law.

Your Honor -- in Your Honor's ruling, Your Honor relied substantially on the decision of Judge Teel in the United States Bankruptcy Court for the District of Columbia which was a ruling on -- not on any avoiding powers or on fraudulent advance, but was based upon a determination of whether or not under D.C. law, Mr. Max Salas had a sufficient interest in the property that he could claim an exemption. And as Your Honor probably knows that's important in the District of Columbia if he has a homestead exemption to a residence in which the debtor is presently residing at the time of the bankruptcy case is unlimited. Therefore, if the debtor obtained his exemption, then he had an unlimited exemption and the property remains outside the reach of creditors at least as to -- as far as the estate of Max Salas is concerned. What Judge Teel did not determine is in the effect of his ruling that Max Salas had an interest in the property on the trustee's avoiding powers or, although not specifically mentioned, clearly he did not say anything, state anything in his opinion nor could he, I don't believe, Your Honor, regarding the

trustee's -- this trustee's ability to recover the property on the basis of a fraudulent conveyance.

And the reason I think -- there's an important distinction here, Your Honor, and the distinction is that with respect to the debtor's residence in the Max Salas case that was determined without reference to when the transfer occurred. And you'll recall that in our papers, Your Honor, we cited several statements made by Judge Teel both in the context of the contested matter related to the debtor's exemption and the actual evidentiary hearing where Judge Teel commented -- in his actual decision, rather, where Judge Teel commented that this all might be upended by the actions of the trustee in the Tennessee case which was also pending at the time that's this case where Ron Salas was the debtor.

And, most importantly, there's the date -- the effective date that the transferred occurred. And there's no dispute that for purposes of Section 548 -- I always get these mixed up, but I think it's 548, the (indiscernible) statute, that for those purposes the transfer, even though it was alleged to have occurred in 2010, for purposes of a fraudulent conveyance was not perfected, and, therefore, was not in effect until the day before the bankruptcy proceeding.

So while that didn't change necessarily the ability of the debtor in that case, Max Salas, to claim the homestead exemption, it did certainly open up his claim -- or open up his

interest to a claim of a fraudulent conveyance since there was no perfection of a transfer until the eve of the bankruptcy case.

Now, Mr. Young has argued previously that the effective date of the transfer was as early as 2010, but there is no factual support or case law support for that. The statute in D.C. and the statute -- and the federal statute both make it very clear that the effective date for purposes of determining whether a transfer took place is the date of the transfer was perfected or if not perfected, then the day immediately prior to the bankruptcy case so that was April 17, 2018. And we contend, Your Honor, that that is an important distinction that the counters which Your Honor has suggested is the effect -- not suggested, sorry -- has determined is the effect of Judge Teel's decision.

We also believe, Your Honor, that there are several other important facts that should have been considered and we don't believe, based on Your Honor's memorandum opinion, that they were considered or at least, on the face of it, it doesn't appear that they were reconsidered. I've already stated that --

THE COURT: I'm sorry. Go ahead. Go ahead.

MR. MCNUTT: I'm sorry.

THE COURT: Go ahead. Go ahead.

MR. MCNUTT: I'm sorry, Your Honor. First, Your

Honor, and this relates to the decision to Your Honor's ruling that distinguishes the Kind Inc. -- Kind Operations Inc. (indiscernible) case. That's the case out of Western District of Pennsylvania in which the court determined that a creditor that had previously lost in a state court proceeding could pursue the same claim as a representative of the bankruptcy estate after having been assigned a purchase -- I think it was purchased, actually, or assigned the claim from the trustee in bankruptcy.

And since I'm on that point, I will say, Your Honor, that one the concerns that I think the parties have with respect to the import of your decision is that it's hard to determine where to draw the line. Your Honor was impressed, if that's the right word, with the fact that my clients represented, substantially, all of the unsecured claims in this estate and that's accurate. My client's claims are over $15 million in total, but they represent not one creditor but two creditors, Your Honor, and there's no -- and each of those creditors represent less than 50 percent of the unsecured claims in this case.

THE COURT: Well, but -- go ahead. Go ahead.

MR. MCNUTT: Secondly, Your Honor, they are not the only claims in this estate. As I read the trustee's final report, there were actually 12 claimants that received payments of this estate including six administrative claims. The

Internal Revenue Service, all seven of which now were paid in full. So as a result of the payments of my clients into the estate, the estate gained $150,000 fair consideration because it was a bid -- fair consideration to the trustee's funds in a circumstance where my clients did not even present the purchase to the trustee, it was this defendant who did it. We didn't ask for the trustee to assign the claims to us. My clients did not ask for that. It was asked by Mr. Salas or by his son, Ron, who is an attorney in Colorado, as Your Honor probably knew of this, but -- and it was a court process -- I'm sorry -- a sale process that Your Honor approved and ordered to go to go forward which we complied with. So we are the bona fide purchasers of the trustee's on the estate's claims by virtue of an open auction in which the competing party was the defendant.

And although Your Honor has made an important point about the size of my client's claims, keep in mind that the reason, as my declaration declares and as Mr. Young asserted in open court, the purpose of Mr. Salas buying the claims was to prevent any party from going after his assets, was to prevent my clients or any other creditor from pursuing a claim or those claims who -- the avoidance and recovery claims against Mr. Max Salas.

So you have this situation where Your -- which Your Honor was concerned about in your memorandum opinion, but my clients represented substantially all of the unsecured claims

in the case and yet the Court ordered the purchase which was authored by Mr. Max Salas or on his behalf where he represented substantially all of the assets of the estate by virtue of having a property that was worth, at the time that he filed his bankruptcy, he said approximately $2.4 million with less than half that in actual mortgage claims or other claims against the property.

So we have a circumstance where my clients represented substantially all of the unsecured debt where Mr. Salas represented -- Mr. Max Salas represented all of the assets of the estate, in fact, the only assets of the estate.

THE COURT: I think you just froze. Mr. McNutt, I think you just froze. You may want to -- if you can -- can you hear me? No. You may want to go back out and come back in. I don't know what to do.

Jeremy, do you have an idea here? You should call him, I think.

THE CLERK: I think he -- looks like he's --

THE COURT: He's doing that.

THE CLERK: Yep. I think he's reentering.

THE COURT: Sorry to call you Jeremy. It just came out. I was befuzzled by the freezing.

(Pause)

THE CLERK: I'm concerned. (Indiscernible).

THE COURT: Maybe you better call him. Let's take a

break.

(Recess taken at 9:34 a.m.)

(Proceedings resumed at 9:35 a.m.)

THE COURT: I hope he's not still talking thinking --

(Pause)

MR. YOUNG: Judge, I tried to call Mr. McNutt just now but it went straight to his voicemail. I just left a message telling him that we're in recess waiting for him to sign back on just so that -- to make sure he knew that he got kicked off.

THE COURT: Thank you.

(Pause)

THE CLERK: It looks like he's back, Your Honor.

THE COURT: We lost you, Mr. McNutt.

MR. MCNUTT: Yeah. I think, Your Honor, the server here at the office went down because I had no phone service or anything so I apologize. I assure you it was not -- well, maybe it was my fault but nothing I did that I know of.

THE COURT: I understand totally. I have similar frustrations from time to time.

MR. MCNUTT: Yes. Technology is wonderful when it works but when it doesn't it gets frustrating especially when you're not in tune. You got to be under 40 I think to be in good shape for that. So, in any event, should I continue, Your Honor? I --

THE COURT: Yes, yes.

MR. MCNUTT: -- again, I apologize.

I think I've, basically, gone through the discussion regarding Judge Teel's decision. When I was -- I was also talking about the money that went into the estate and the benefits of the estate, and, basically, the consideration that was paid for those causes of action.

And the next point I wanted to make, Your Honor, is that if you recall when Your Honor ruled on Mr. Young's motion to dismiss -- or made the motions to dismiss, the final one, the Court determined, among other things, that for purposes of this complaint, the plaintiffs were standing in the shoes of the trustee. They were not acting on their own behalf; they were acting through the trustee and for the benefit of the estate.

And I had found no cases which indicate, Your Honor, that in a circumstance like this or in any other circumstance where the real party in interest is the trustee in bankruptcy or the bankruptcy estate which is -- I think it's actually the same thing -- that the status of the claims related to the plaintiffs in this case by virtue of Judge Teel's decision would be binding on the bankruptcy estate or the trustee in bankruptcy whose position is in privity only with the debtor, in certain cases -- instances, and not with any creditor. And we cited case law to that effect. I don't actually have that

right in front of me but I can certainly find it as we go through this.

And I believe, Your Honor, that -- I believe Your Honor has put too much emphasis on the fact that my clients have such large claims. Would, Your Honor -- the question I raise, I guess somewhat rhetorical is, would Your Honor's decision had been the same if my clients represented -- if my clients had two claims which were $10,000? Let's say they were $10,000 and having claims of $20,000 would have been more than 40 percent of the listed unsecured claims in the case. Or suppose their claims which totaled $100,000 that would have been substantially the bulk of the claims against the estate.

The fact that my clients have substantial claims is a result of the actions of the defendant and the debtor, not anything that my clients have done. It's not -- my clients have not manufactured these claims. These claims resulted from a prolific debt that was caused by the negligence of the debtor and the defendant. My clients should not be punished for that, Your Honor. It's -- and I believe that's what your decision does. And I believe, with all due respect, Your Honor, and I have the utmost respect for this Court, I think you understand that, always have. The fact that my clients have large claims does not enter into whether they had the ability to assert those claims on behalf of this estate. And even though many of the claims -- obviously, this estate have been paid by virtue

of the purchase of my clients -- by my clients over $150,000. There are claims that still remain to be paid which would be paid out of any judgment whether that results from this case.

When I said before, Your Honor, and I'll make this point quickly, I believe that if this decision stands it will create precedent for the next situation down the road where a Kind-like -- a Kind Operations Inc.-like situation arises and a creditor with a substantial claim against the estate that holds the case decided in another court assumes for the benefit of the estate. It could be claims for the benefit of all of the parties to the estate and that's exactly what you are doing.

It just so happens -- and I understand, it just so happens that my clients represent the -- almost all of the claims of the estate because of the extreme -- because of the amount of the judgment that was entered in their favor. But the reason why the judgment was entered in that amount is because my clients or the estates of the two youngsters that were killed in that fire were only 24 years old. So if they were 40 or 45 years old, the claims wouldn't have been and the judgment wouldn't have been nearly as high, but they were young with their whole lives ahead of them. Unfortunately, that -- their lives were snuffed out, but they had that earning power and because of that earning power, the judgment claims were substantially higher. They were high.

Your Honor, with respect to the privity issues, hold

on -- in the Sixth Circuit in the case of Sanders Confectionary Products, it states that a trustee stands in privy to the debtor and not any creditors. Therefore, my client's claims, as asserted on behalf of the trustee in the bankruptcy estate, are in privity only with the debtor, not with any creditor. And if Your Honor needs that citation I believe I sent it before but if not, it's 973 F.2d 474, and the specific language is on Pages 480 and 481, and, as I said, that's a Sixth Circuit case of 1992.

In the Kind case, the case that Your Honor did redo, it states that the capacity of the plaintiff as assignee of the trustee is different from its capacity as party to its prior state court action. That's what the Kind case states. That's the Western District of Pennsylvania.

And Your Honor distinguished that only because my clients had such extensive claims and don't I think that's a distinguishing factor. I don't think that's an appropriate distinguishing factor. I understand that it's psychologically important or at least psychologically considered important, but it psychologically comes to mind, but that is not a legal basis or a factual basis to change the rules regarding privity, real party in interest, and the fact that these parties are standing in the shoes of the estate and the trustee, not in the shoes of any creditor including the plaintiffs in this case.

The Kind decision that I just mentioned, Your Honor,

is consistent with the substantial body of case law which asserts that in a derivative action like the instant case, and I'm quoting now, "the person holding the substantive right sought to be enforced and not necessarily the person who will ultimately benefit from the recovery is the real party in interest." And that's actually from the Farrell Construction Company v. Jefferson Parish, Louisiana, Fifth Circuit case, 1990, and that's cited at 896 F.2d 136, and, specifically, on Page 140. And the quote that is a real party in interest is, "the person holding the substantive right sought to be enforced and not necessarily the person who will ultimately benefit from the recovery."

That, also, Your Honor, states quite clearly that when determining the rights of the parties with respect to items like res judicata and collateral estoppel that the real party in interest is the party that the Court should focus on and that is the trustee and the trustee's claims. The trustee was not a party to the exemption decision nor could it be, nor could it have been. Even if the trustee chose somehow to intervene, the trustee would not intervening in the exemption decision could it have, there was no trustee appointed at the time that the exemption decision was determined. The trustee is not appointed until months later.

The next part of this, Your Honor, is the -- I want to focus on -- and I'm almost done here. I want to focus on

the McKinley case. That's the case that was cited in my motion papers. It's McKinley v. Crawford, and that's a case cited at 58 F.2d 528 and specifically on Page 529 and 530 is where my discussion comes from. And this is a D.C. Court of Appeals case from 1932, and I believe the reason that it's in the federal court order is because of the jurisdiction -- federal jurisdiction over the D.C. -- over D.C. and the D.C. Courts back in 1932. So I believe the D.C. -- the appellate decisions, even though they were not from the United State District Court or recorded in the federal court, I'm not certain, but I believe that's correct.

The McKinley case wasn't cited in your memorandum opinion, Your Honor, and I've been told that it was considered, but we argue that with respect to the undisputed facts of the case that it is clear that even if everything else -- well, it's clear that in 2007 Max Salas deeded the property. The property was deed, if you recall, from Max Salas and his wife to Max Salas, and then from Max Salas to his son, Ron Salas, and Ron Salas remained the only title owner on the property and the only owner of record without any intervening title documents asserted.

So Your Honor cited the general rule in asking for the hearing in March on the motions for summary judgment. Your Honor cited the general rule that where there was -- and I think I've got it here. The general rule is that the actual

visible and unequivocal possession of real estate inconsistent with the record title and under an apparent claim of ownership is notice to purchasers of an adverse interest in the property to be purchased. That, as I understand it, is the basis of Your Honor's decision or at least reluctance to grant summary judgment to the plaintiffs on the issue of inquiry notice, and that is the accepted general rule. However, Your Honor, McKinley and many other cases including the cases throughout Tennessee --

THE COURT: Wait just a second. Wait one -- I'm sorry.

MR. MCNUTT: -- state that there is --

THE COURT: I'm on mute. Hang on a minute.

MR. MCNUTT: -- an exception to the general rules.

THE COURT: Wait just one second.

MR. MCNUTT: I'll hang on.

THE COURT: One second. I'm assuming you're talking about -- I didn't grant summary judgment on 544(a)(3) and 544(a)(1).

MR. MCNUTT: You did not, Your Honor. My -- and my argument was that I believe you should have granted us summary judgment, not that you granted summary judgment to the other side --

THE COURT: Okay.

MR. MCNUTT: -- but that I -- you should have granted

summary judgment to us. I'm being very selfish here but that's what I believe.

THE COURT: All right. You can argue what you need. It's no offense to me.

MR. MCNUTT: I appreciate it, Your Honor.

Your Honor, my point of this is that Your Honor cited in your memorandum of opinion, and, hopefully, I can find it fairly quickly here. You cited, basically, some competing undisputed facts. And the undisputed facts that you cited that the plaintiffs asserted were that Len Salas was the named owner under titles of the property, the mortgage on the property was in Len Salas's name only, rental leases were signed by Max Salas on behalf of CLR, rather than individually, and, I might add, Your Honor, we're always in the name of trust. Under the name of CLR there was no indication of any entity other than Mr. Max Salas acting as a trustee or a trust under the name of CLR.

And two more important factors, one is that the recorded judgment showed Len Salas was held liable as the owner of the property and that Max Salas was held liable for mismanagement, not owner of the property.

Those facts, Your Honor, I believe into the framework of the McKinley decision which, as I said, is not only valid law in the District of Columbia which is all that's really important, but it is a recognized law in many jurisdictions.

At the time of the Strong decision which I cited in support of McKinley there were -- let's see if I can find this here. And that case was decided in 1929. At the time of the Strong decision which is two years prior to McKinley, according to the Strong decision, and that's again 159 Tenn. 337, which is 1929, as I said, the Supreme Court of Tennessee, and it relies heavily on two citations. One was a Michigan case, Bloomer v. Henderson, and that appears on Page 344 of the Strong decision. And Curry v. Williams, which is a Tennessee case.

And I'm quoting here from -- this is a quote from the Curry v. Williams case which is cited in Strong and it states: "The propriety execution delivers to another a solemn deed or a conveyance of the land itself and suffers bad seed to go upon record. He sends to rule the world," colon, quote: "Whatever right I have or may claim to have in this land, I have conveyed to my grantee and, though I am yet in possession, it is for a temporary purpose without claim or right and merely as a tenant at sufferance to my grantee."

Later, on the Strong court case, "all presumption of right or claim of right is rebutted by his own act and deed that is after the grantor." One of the main objects of the registry law would be disputed by any other rule. And, again, cites Curry v. Williams in support of that proposition. I believe that's the end of it. There's a quote in there I

believe it's from -- it appears to be from Curry v. Williams.

In the McKinley case -- well, it says there's an exception to the general rule where a vendor remains for a time in possession after given a simple deed reconveyance since he permits to be recorded. And then the Court states, and I'm emphasizing this, Your Honor, the object of the general rule is to protect one in possession. Remember, the general rule is if you're in an active and open possession, then that's notice to the world that you -- that you have to require further as to ownership.

This exception is referenced as follows: "The object of the general rule is to protect one in possession from acts of others who do not derive their title from him, from the grantor, not to protect the grantor against his own acts and especially against his own deed." And that's cited at Page 530 of the McKinley decision.

Let me see if I have overlooked anything that I outlined. I think that's my argument.

And the point of that is, Your Honor, while I believe there are -- none of it is determined back -- this is an issue not right for summary judgment and I assert that based on the undisputed facts of the title of the property being in the name of Len Salas at the hand of Max Salas that the McKinley case controls and the McKinley case is the law in the District of Columbia, and it is, apparently, the law in many other

jurisdictions including Tennessee.

Your Honor, I stated in our motion the law here with respect in motions for your consideration, and I won't go over that any more except to say that in the case of Harris v. Perry which is in the Western District of Tennessee. It's a Lexus cite as 13 -- it's a 2016 Lexus -- U.S. District Lexus 139942, 26 -- 2016 Westlaw 5396701. Essentially, this emphasizes I think what is consistent with the law cited and in these other cases, but it says basically that relief Rule 5090, that's the federal rule that is part of Rule 9023, I think it is, the bankruptcy court rule, the relief Rule 5090 is available and appropriate in those cases in which the movant has set forth facts or law of a strongly convincing nature that show the Court's prior ruling should be reversed.

Your Honor, that's my argument. Thank you very much.

THE COURT: All right. Just -- Mr. McNutt, just so you know it doesn't bother me that somebody asks to reconsider because I've been wrong and I may be wrong in this case, but I've been wrong before so just so you know.

Mr. Young --

MR. MCNUTT: I say this by all due respect, Your Honor, nothing more.

THE COURT: I agree wholeheartedly.

Mr. Young?

MR. YOUNG: Good morning, Your Honor. Phillip Young

on behalf of the Defendant, Max Salas. I'm going to try to be very brief.

The plaintiff's motion is not really a motion to alter or amend at all. It's, essentially, an appeal without filing a notice of appeal, but this is filed as a Rule 59 motion which is disfavored and has to be considered as such. To succeed on a Rule 59 motion, a movant must show that there is one of the following: A clear error of law, newly discovered evidence, a change in controlling law, a need prevent manifest injustice, the court clearly overlooked material facts, the court clearly overlooked controlling law. The plaintiffs have shown none of this.

The courts have noticed that Rule 59 is an exacting standard and an extraordinary remedy restricted to those circumstances of which the moving party has set forth specific facts or specific law of a -- and this is the word that's used -- strongly convincing nature that indicate that the court's prior ruling should be reversed. The plaintiffs, respectfully, have not come close to meeting this standard. Rather they simply restated their entire argument on every single issue. This Court has already considered all of these arguments ad nauseam and reached its conclusion.

If the plaintiffs disagree with this Court's conclusion, and they're certainly entitled to, they should seek permission to file an interlocutory appeal, otherwise, we need

to set this matter for trial.

And, Judge, I'm going to resist the urge to restate my client's position on every single issue, but I do find it necessary to at least clarify a few things that were said this morning.

I think this Court found preclusion as to a conclusion by the D.C. Court. For a conclusion -- for a preclusion to apply, and this is an important point, it doesn't have to be the exact same party; it just has to be a party that somehow is standing in privity with the former party. And we cited to a number of cases in our briefs, plural, where a subsequent party was precluded even though they weren't the same party. We understand that it's not the exact same party. I represent trustees all the time. I understand the difference between a trustee and a creditor. But there are lots of cases that say if the former party appropriately represented the same interest as the current party then preclusion applies. That's definitely the case here.

As the courts -- as Mr. McNutt has talked about this morning, the dollar amount is one indicia of that. They represent -- I don't remember the number, 98 percent, 99 percent of the client pool. They had the exact same interest in this matter as they did in the prior matter. They're even represented by the same counsel in this case and the same decision maker. That's what makes this different than other

cases. It is in that degree -- that full degree of alignment means that they are in privity.

And I'd be remiss if I didn't point out that Mr. McNutt said that the Court is punishing his client. This isn't a matter of punishment. I think the Court understands that. It's a matter of whether these issues have already been fully tried and decided and they have, and now maybe two times and working on three times. They've been fully tried and decided.

I said I was going to be brief. I'm going to stop there unless the Court has other questions for me.

THE COURT: I don't.

Mr. McNutt, do you want to say anything else?

MR. MCNUTT: Yeah. I don't want to revisit everything I've said. I'm sure Your Honor understands my position.

I'm a little troubled by this assertion by Mr. Young that privity stands in the way of my clients -- of the estate's ability to -- of my clients ability to cover for the estate. My recollection is that none of the cases cited by Mr. Young involve an assertion of a trustee having privity for a creditor in a case in which the trustee was not even appointed at the time that the original case was argued -- was presented and decided. I don't believe any of the cases were trustee cases but I could be wrong on that, but I'm sure they do not fit the

facts of this case.

And I do agree with Mr. Young on one other thing that if Your Honor does not agree with us and determines not to reconsider your decision, then I think we do have -- I think it's necessary, and I hope that Your Honor agrees, I don't want to have two trials. I don't want to be in court twice, once on the issues that Your Honor has not yet decided, and again on the issues that have been decided in this motion, so I believe that this is a matter that's right for an interlocutory appeal so that we don't have the issue of having potentially two trials in the event that we loss on the issues that are left after Your Honor's decision. So I don't want to have to try this case twice.

And almost all of the facts and all of the witnesses would be the same if Your Honor decides not to reconsider and that decision is overturned on appeal so we would literally be having two trials on the same -- on, essentially, the same issues of the same parties just very technical arguments that may be decided on appeal.

THE COURT: Just so you know, Mr. McNutt, it's not my decision whether you have an opportunity to appeal assuming what -- I do want to take a break in a minute, but I don't have a dog in that fight. So let me take about a five-minute break.

THE CLERK: All rise.

(Recess taken at 10:08 a.m.)

(Proceedings resume at 10:16 a.m.)

THE CLERK: All rise.

THE COURT: All right. I appreciate your position, Mr. McNutt. This is a hard case and it was a hard case from the very beginning when you were in state court, and I do have sympathy for those folks. It's not my intention to punish anybody. But I don't believe, based on your papers and the argument, that you met the standard under rule -- Bankruptcy Rule 9023, and Federal Rule Civil Procedure 59 for a motion to alter or amend.

The arguments made here today were the same arguments made previously before we entered our lengthy opinion. And I agree with you that leave to appeal is something you should strongly consider. Just bear in mind that you have 14 days from the date of whatever order comes down on this denying the motion to alter or amend.

I call your attention to Rule 8004 which is how you do it. Bankruptcy Rule 8004 and Bankruptcy Rule 8005. They're two different steps. If you want to appeal you got to -- from an interlocutory order you got to file it in time and be accompanied by a motion for a leave to appeal prepared in accordance with that rule and the contents of the motion have to be looked at and in accordance with Rule 8004.

If you want to appeal to the District Court in addition to whatever you do under 8004, you have to make an

election to have it heard by the District Court rather than our Bankruptcy Appellate Panel and that's under Rule 8005. I don't know what you want but just be aware of Rule 8004 and 8005, and, again, 14 days to appeal from the date of the order.

And I'm going to deny the motion. I'm interested in what happens after if you do file a motion for leave to appeal either for the District Court or the Bankruptcy Appellate Panel. And I will await a decision in that matter before we set this case for trial.

Is that what you want, Mr. McNutt?

MR. MCNUTT: It is, Your Honor. And I appreciate your patience and consideration particularly with my technological issues -- technology issue this morning.

THE COURT: No problem at all. By the way --

MR. MCNUTT: And that --

THE COURT: -- after September the 15th or so, we're going to have to go to -- in arguments and in trials, obviously, we're going to have to go to in person, so luckily you got this under the Covid rules but we've got to change these -- the judicial conference in D.C. has said we got to go back to in person for the most part.

MR. MCNUTT: I was hoping that was a major consideration, your granting my motion today so you wouldn't have to see me anymore, but I guess -- I guess that's not going to work.

THE COURT: You are welcomed here anytime, Mr. McNutt.

Mr. Young, will you draw the order?

MR. YOUNG: Yes, Judge. I just wanted to add just as a housekeeping matter. If 14 days passes and no appeal is filed, I'll file a motion to set a pre-trial conference to bring that to the Court's attention, otherwise, I think we'll just wait, you know, until the conclusion of the appeal if an appeal is granted.

THE COURT: All right. Let me -- Mr. McNutt, I just want to make sure and imprint upon your brain, Rule 8004 and Rule 8005 of the Bankruptcy Rules of Civil Procedure.

All right. We'll be adjourned.

THE CLERK: All rise.

THE COURT: Take care.

MR. MCNUTT: Thank you, Your Honor.

MR. YOUNG: Thank you, Your Honor.

(Proceedings concluded at 10:20 a.m.)

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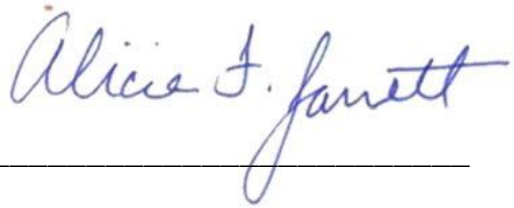
C E R T I F I C A T I O N

I, Alicia Jarrett, court-approved transcriber, hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.



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ALICIA JARRETT, AAERT NO. 428 DATE: November 7, 2023

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